82-2010

No.

Office-Supreme Court, U.S.
FILED
JUN 8 1983
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

BERTHOLD R. KUELLMAR and ELIZABETH S. KUELLMAR,

Petitioners,

vs.

VILLAGE OF BROOKFIELD, A MUNICIPAL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

LONNY BEN OGUS
Suite 920
39 South LaSalle Street
Chicago, Illinois 60603
(312) 332-7374

Attorney for Petitioners

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTION PRESENTED

1. Is there a deprivation of property without Constitutional Due Process when the decisionmaker at trial does unknown, independent investigation which cannot be cross-examined or parried and uses that information to make the decision to take property?

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Statutes Involved	2
Statement of the Case	2
Reasons for Granting the Writ	3
Argument	3
Conclusion	9

Appendices:

Appendix A—Opinion of Illinois Appellate Court App. 1

Appendix B—Order of the Illinois Supreme Court ..... App. 11

Appendix C—Transcript of Petitioners' Trial p. 55-58 ..... App. 12

Appendix D—Transcript of Petitioners' Trial p. 129 ..... App. 15

Appendix E—Order of Trial Court, "Decree of Demolition", (R. 59) ..... App. 16

TABLE OF AUTHORITIES CITED

Cases

	PAGE
Armstrong v. Manzo, 380 U.S. 545 (1965)	6
Bonhiver v. Rotenberg, Schwartzman and Richard, 461 F.2d 925 (7th Cir., 1972)	6
Bute v. Illinois, 333 U.S. 640 (1974)	5
Carey v. Piphus, 435 U.S. 247 (1978)	5
Carter v. Morehouse Parish School Board, 441 F.2d 380 (5th Cir., 1971)	6
Coe v. Armour Fertility Works, 237 U.S. 413 (1915)	8
Fuentas v. Shevin, 407 U.S. 67 (1972)	8
Goldberg v. Kelly, 397 U.S. 254 (1970)	6
Herbert v. Louisiana, 272 U.S. 312 (1926)	4
In Re Japanese Electronics Product Antitrust, Litigation, 631 F.2d 1069 (3rd Cir., 1980)	6
Irvin v. Dowd, 366 U.S. 717 (1961)	6, 8
Loretta v. Teleprompter, ... U.S. ....., 102 S.Ct. 3164 (1982)	4
Lynch v. Household Finance Corporation, 405 U.S. 538 (1972)	4, 9
Mayola v. State of Alabama, 623 F.2d 922 (5th Cir., 1980)	6
McElroy v. Greene, 360 U.S. 474 (1959)	6
Murphy v. Florida, 421 U.S. 794 (1975)	6

PAGE

Ohio Bell Telephone Company v. Commission, 301 U.S. 292 (1937) 5, 7

Ortman v. Union Pacific Railway Company, 4 P 858 (Kan., 1884) 7, 8

Shelly v. Kraemer, 334 U.S. 1 (1943) 9

Southern Railway Company v. Virginia, 290 U.S. 190 (1934) 4, 7, 9

Woodson v. Anoka, 54 N.W. 187 (S.C.Minn., 1893) 7

Constitution

Fourteenth Amendment to United States Constitution 2, 3, 4, 5

In the
Supreme Court of the United States

OCTOBER TERM, 1982

NO.

BERTHOLD R. KUELLMAR and
ELIZABETH S. KUELLMAR,

Petitioners,

VS.

VILLAGE OF BROOKFIELD,
A MUNICIPAL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

OPINION BELOW

The opinion of the Illinois Appellate Court is not reported (Illinois Supreme Court Rule 23) but is printed in the Appendix to this Petition (Appendix "A"). The opinion of the Illinois Appellate Court was entered on December 3, 1982. A timely Petition for Rehearing was denied on January 6, 1983. A Petition for Leave to Appeal was denied by the Illinois Supreme Court on April 12, 1983. (No. 57916, Appendix B).

JURISDICTION

The Order of the Illinois Supreme Court was entered on April 12, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257.

STATUTES INVOLVED

AMENDMENT 14 — CITIZENS OF THE UNITED STATES

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is an appeal from an Order allowing the Village of Brookfield to demolish Petitioners' house because it was alleged to be dangerous and unsafe. During the trial, a non-jury trial, the trial judge went to the property in question during a lunch break in the proceedings. There is nothing in the Record of proceedings which shows what the trial court saw or did. After the conclusion of the case the trial judge ruled that the house was dangerous and unsafe. The Trial judge orally stated that he used his view of the premises to come to a decision. The trial court's written "Decree of Demolition" states that the Court took into consideration its independent view of the house. The trial transcript is silent as to what the trial court saw or did in its independent investigation which it relied on.

REASONS FOR GRANTING THE WRIT

Property, especially one's home, is our most prized and protected possession. The right to property, and not have it taken without due process of law, is our most prized, protected and envied constitutional guarantee. These Petitioners are having their home taken by the Village of Brookfield, Illinois without due process in that the trial court which approved the taking made an independent investigation, dehors the record, of the condition of the house. The trial court, both orally and in writing, held that the independent investigation was relied on in coming to a decision. Petitioners could not and still cannot cross-examine or refute secret evidence. Appellate Courts cannot review secret evidence. This Court has consistently required due process before property is taken. The right being eroded is of such importance to every person that this Court must exercise its supervisory power as a matter of judicial discretion to send a signal that this type of erosion of due process is unconstitutional in order to ensure that States comply with the Fourteenth Amendment of the Constitution.

ARGUMENT

Petitioner's trial began on March 30, 1982, witnesses being heard until 12:50 PM. The trial court, on Motion of the Respondents, went to view the subject matter of this litigation, a house at 3620 Prarie Avenue, Brookfield, Illinois. The trial court viewed the house during the lunch break and the trial resumed at 3:00 PM. (Appendix C). There is no record to show what the trial court did, who,

if anyone, the Court spoke to or who, if anyone, was present.

The trial continued and later that day the trial court announced its decision:

> "[L]et the record show that as far as I'm concerned, *after viewing the premises, as to its condition today,* I believe the building and the premises are unsafe and dangerous as far as I'm concerned." (emphasis added) (Appendix D)

The written "Decree of Demolition" states the decision was made "after personally viewing the premises". (Appendix E)

The trial court, in this bench trial, made an independent investigation, producing evidence not in the record thereby denying petitioners the right to rebut or cross-examine that which the trial court saw because no one knows what he saw.

The Fourteenth Amendment requires that persons not be deprived of their property unless they are given due process, *Loretto* v. *Teleprompter,* ..... U.S. ....., 102 S.Ct. 3164 (1982).

Enjoyment of property rights is an essential precondition to the realization of all other basic civil rights and liberties which the Fourteenth Amendment was to guarantee, *Lynch* v. *Household Finance Corporation,* 405 U.S. 538, 544 (1972).

Due process under the Fourteenth Amendment requires that state action be consistent with fundamental principles of liberty and justice, *Herbert* v. *Louisiana,* 272 U.S. 312 (1926), *Southern Railway Company* v. *Virginia,* 290 U.S. 190, 196 (1934). It is the province of this Court to decide

whether the practice of the State Court, even if in accordance with the laws of the State, was at variance with procedure constituting due process of law under the Fourteenth Amendment, *Bute* v. *Illinois*, 333 U.S. 640, 670 (1974). Due process minimizes unfair deprivation of property by enabling persons to contest the basis upon which a State proposes to deprive persons of protected interests, *Carey* v. *Piphus*, 435 U.S. 247, 259 (1978).

As can be said about the actions of the trial court:

> "From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is thus that even now we do not know the particular or evidential facts of which the commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find out. When [things] are put into evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The Commission . . . contents itself with saying that in gathering them it went to [the facts] as if a judge were to tell us, 'I looked at the statistics in the Library of Congress and they teach me thus and so.' This will never do if the hearings and appeals are to be more than empty forms . . . To put the problem more concretely, how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence was unknown and unknowable. '. . . . What the [appellate court] did was take the word of the [trier of fact] as to the outcome of a secret investigation, and let it go at that.' A hearing is not judicial, at least in any adequate sense unless the evidence be known." *Ohio Bell Telephone Company* v. *Commission*, 301 U.S. 292, 302-4 (1937).

Immutable in our jurisprudence, under all types of cases, is that where governmental action takes something and the reasonableness of the taking depends on findings, the government's case must be disclosed so that the individual can show it to be incorrect, *McElroy* v. *Greene*, 360 U.S. 474, 496-7 (1959). A verdict must be based upon evidence developed at trial, *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961). Due process requires an effective opportunity to defend by confronting adverse testimony and presenting one's own arguments and evidence orally and a decision maker must rule solely on the evidence adduced at the hearing and state the reasons for his determination and indicate the evidence relied upon, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

The constitutional standard of fairness requires that a trier of fact base its decision solely on the evidence produced in Court, *Mayola* v. *State of Alabama*, 623 F.2d 992 (5th Cir., 1980), citing *Irwin* v. *Dowd*, supra, and *Murphy* v. *Florida*, 421 U.S. at 799-800. Due process requires that decisionmakers' conclusions rest solely on the legal rules and evidence adduced at the hearing, *In Re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069 (3rd Cir., 1980) citing *Goldberg* v. *Kelly*, supra. A ruling based on evidence which a party has not been allowed to confront or rebut is one which denies due process, *Carter* v. *Morehouse Parish School Board*, 441 F.2d 380 (5th Cir., 1971), citing *Armstrong* v. *Manzo*, 380 U.S. 545 (1965). A determination by a trial judge, in civil or criminal cases, based upon private investigation untested by cross-examination or any of the rules of evidence constitutes a denial of due process of law, *Bonhiver* v. *Rotenberg, Schwartzman and Richards*, 461 F.2d 925 (7th Cir., 1972).

In a land condemnation case, two (2) jurors viewed the land at issue and "thereby received evidence not given

them in court . . . their personal examination of the lot and the knowledge acquired therefrom doubtless influenced them . . . It is not therefore certain that the verdict was rendered upon the evidence given in Court", requiring reversal, *Ortman* v. *Union Pacific Railway Co.*, 4 P. 858 (Kan., 1884). In a case involving the condition of a sidewalk, two (2) jurors went to the location and talked with persons and tested the sidewalk, requiring reversal, *Woodson* v. *Anoka*, 54 N.W. 187 (S.C. Minn., 1893).

If the Respondent government is correct, it would give this State trial Court a power possessed by no other officer, administrative body, or tribunal under our constitution, and mean that findings could be made capriciously by administrative fiat, such authority is inconsistent with rational justice and comes under the Constitution's condemnation of all arbitrary exercise of power, *Southern Railway Company* v. *Virginia*, supra, 290 U.S. at 195.

In the instant case, the trial court went on its own, after Motion of the Respondent, to the house, looked at it (but exactly what it did or saw is unknown and unknowable) and then in making its decision expressly stated that its independent investigation was used to make the decision. Petitioner has no knowledge of what the decisonmaker did, saw or who it spoke to. Petitioners cannot cross-examine or parry facts which are undisclosed to them. This Court, in *Ohio Bell Telephone*, supra, specifically condemned a judge going to a library to acquire knowledge because no one knows how to challenge what the Judge learned. Here, the trial court went to the house, surely the "library" in this type case, acquired knowledge which cannot be challenged, explained or rebutted. Neither could the Illinois Appellate Court or any other, including this Court, review what the judge saw and learned. It cannot be said the trial court went to the right house or that interested parties for one side did not talk to the

Court. Nothing certain about the view can be shown, argued and reviewed.

The Appellate Court of Illinois held that "such an inspection may well have assisted the Court in understanding certain photographic evidence" and "the trial court based its findings not on its inspection, but upon the rather substantial competent evidence presented by the parties in open court" (Appendix A, pp. 7-8). Thus, the Appellate Court first says the independent view may have assisted and then says it was not used. Irregardless of this inconsistency, the "fact" that other evidence supposedly shows the decision to be correct is irrelevant, the proceeding is tainted. "This is true regardless of the heinousness of the crime charged, the apparent guilt of the offender, or the station in life which he occupies", *Irwin* v. *Dowd*, supra, 366 U.S. at 722. "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits", *Coe* v. *Armour Fertility Works*, 237 U.S. 413, 424 (1915), *Fuentas* v. *Shevin*, 407 U.S. 67, 87 (1972). The Appellate Court of Illinois ignores years of precedent in finding that a violation of due process is not error unless every bit of testimony is improper. Since the Appellate Court found such testimony may have assisted, and the trial Court specifically stated that its view aided its decision, due process requires a new trial, see *Ortman* v. *Union Pacific Railway Co.*, supra, (Where in a long condemnation case, evidence acquired in an independent, off the record investigation tainted the other evidence.)

By sanctioning the "Decree of Demolition" directing the Respondent to take Petitioners' property, it approved action taken without proper hearing, evidence or known basis, in order to rule that such taking was not arbitrary,

but there is nothing to indicate what would have been held arbitrary or how this could be established, no contestant would have fair opportunity for relief. "There would be nothing to show the grounds upon which the Commissioner based his conclusion. He alone would be cognizant of the mental process which begot his urgent opinion . . . Before its property can be taken [under color of law, a person] is entitled to a fair hearing upon the fundamental facts. This has not been accorded." *Southern Railway Company* v. *Virginia,* supra, 290 U.S. at 198-99.

These Petitioners are having their property taken by governmental action not in accord with Constitutional Due Process. They cannot challenge what the trial Court saw and relied upon because it is unknown what the trial Court saw and relied upon. This property is essential to the Petitioners.

Property rights are foremost in Civil rights and liberties which the Amendment was intended to guarantee, *Shelly* v. *Kraemer,* 334 U.S. 1 (1948), *Lynch* v. *Household Finance Corporation,* supra, 405 U.S. at 544. Any dilution of this most basic right must be prevented lest encouragement be given to deny citizens this right. The lower court decision affects us all.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully submit that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

Lonny Ben Ogus
Suite 920
39 South LaSalle Street
Chicago, Illinois 60603
(312) 332-7374
Attorney for Petitioners

APPENDIX

APPENDIX A

Fifth Division
December 3, 1982

82-1078

VILLAGE OF BROOKFIELD, a municipal corporation,

Plaintiff-Appellee,

v.

BERTHOLD R. KUELLMAR and ELIZABETH S. KUELLMAR,

Defendants-Appellants.

Appeal from the Circuit Court of Cook County
Honorable Angelo D. Mistretta, Presiding.

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

Plaintiff, Village of Brookfield, instituted this action to demolish a single-family residence owned by defendants, Berthold and Elizabeth Kuellmar. After a trial without a jury, a judgment for demolition was entered. A stay of demolition was subsequently entered, and defendants prosecuted this appeal raising the following issues: (1) whether the trial court committed reversible error by conducting a physical inspection of the building *de hors* the record, and then incorporating this inspection in its determination of the case; (2) whether the trial court was

required to specify in its judgment the conditions which rendered the building dangerous and unsafe and beyond repair; and (3) whether plaintiff sustained its burden of proving that the building was unsafe, dangerous and unrepairable. We affirm.

The plaintiff's complaint alleged that the single-family residence was dangerous and unsafe because of the following conditions:

> "The foundation is in a state of decay, the footings are in a state of disrepair and cannot support the foundation wall, the foundation has sunk, the lumber has deteriorated and is collapsing extensively, fire and water damage, the sheathing boards and siding are in a state of disrepair, the gas pipes are unsafe, the roof is leaking and the interior floors have deteriorated, the premises are infested with insects, the furnace and water heaters have been subjected to excessive water damage by flooding, the entire electrical system is hazardous because of the unauthorized use of temporary runs, extension cords, the low water pressure impairs the plumbing facilities."

The complaint further alleged that Douglas S. Cultra, the plaintiff's housing code enforcement officer, had determined the building to be "so weakened that it is dangerous and unsafe," that defendants "have permitted the building to remain in constant and continuous disrepair, causing it to become a menace to public health, safety and comfort and public welfare and exposed it to fire," that defendants were notified of the above condition, and that they have "wholly failed and neglected to take any steps to correct or abate the situation."

The matter was tried on March 30, 1982. At trial, Charles LaGreco, the building inspector of plaintiff, testified that he conducted eight inspections of the building. From these he noted the following conditions:

1. The hot and cold running water are not connected to the kitchen sink.

2. The toilet is flushed by dumping a pail of water from the bathtub, which in turn is fed by a hose.

3. There is no hot water.

4. Debris material and clothes are hung in doorways to retain heat.

5. Doors are off hinges due to settling.

6. The windows are difficult to operate because of settling of the house.

7. Some windows are boarded up.

8. There is still fire damage from a fire ten years ago.

9. The basement has a foot of water in it.

10. The mortar and matrix in the foundation is missing in many areas and has crumbled and fallen out.

11. There is extreme rot in the beams throughout.

12. The rear portion of the house is settling away from the main house.

13. There are electrical switches which do not function properly.

14. There are extremely rusted and corroded BX cables and junction boxes.

15. There is a metal jack and shoring lumber supporting the rear portion which is pulling away from the main house.

16. The roof shows extreme rotting, causing the ceiling to fall, thus exposing rotted sheathing material, rafters and joists.

17. The foundation of the house is deteriorated and falling and not capable of keeping moisture out of the interior.

18. The pipes in the house are not in a system-functioning condition.

19. The treads and risers of the front steps are rotted.

20. The exterior of the premises has construction debris, kitty litter and animal waste.

21. The water pumped from the basement flooded a neighbor's yard and seeped into his foundation and went over the public sidewalk to the public parkway, curb and street and caused a very hazardous condition.

LaGrego further testified that in his opinion the premises were not fit for human habitation.

Joseph Stulgin, a real estate appraiser, testified that he inspected the premises. In his opinion the structure has no value whatsoever. He stated that the value of the property would be the value of the land, minus demolition costs, or probably about $17,000 or $18,000.

Edward Gorniak, the fire chief of plaintiff, testified that he inspected the building 10 years ago when there was a fire, and again more recently due to complaints. In his opinion the building is a fire hazard and a safety hazard due to the accumulation of materials, the use and storage of coal in the open fireplace, the wiring, and the structural condition. He also noted that the main bearing timbers of the house are completely dry rotted.

David Russell, a state-registered sanitarian, testified. In his opinion the premises are not fit for human habitation. He stated that residue from cats and garbage were present throughout the house, that the refrigerator was not work-

ing and was filled with wire and other items including open food, thus creating a breeding ground for bacteria and insects, and that water in the basement created a breeding ground for mosquitoes. There was also evidence of "kitty litter" and fecal matter being thrown into the back yard.

Pierre Panicali, a licensed architect and structural engineer, testified that he conducted an inspection of the premises. From his inspection he noted the following conditions with respect to the building:

1. The mortar in the foundation has deteriorated to virtually sand.

2. None of the foundation could be salvaged.

3. The wooden beams holding up the roof have dry rotted.

4. There are holes in the roof.

5. The rear portion of the house is settling and sagging.

6. The roof has dry rot.

7. Structurally, the premises are not habitable.

8. The back portion of the premises is not salvageable.

9. Apart from the foundation, the rest of the house has problems with wood beams rotting in the basement.

10. The building is deteriorated over 50%, between 60% to 70%.

11. To salvage the house, it would have to be determined if there was any dry rot in the walls under the plaster, and then jack up the house and remove and repour the foundation.

12. It would cost between $60,000 and $120,000 to make the home habitable.

James Schriner, an architect and engineer retained by defendants, testified that he conducted an inspection of the premises. In his opinion the condition of the foundation was sound. He stated that any structural problems were typical of houses of the same type and age, that some successful repairs had been done, that if certain work was done the house would be in "A-1 shape," and that repairs could be accomplished for $16,000. He also testified that with repairs, the house would probably outlive him, and that there was no structural danger associated with the building.

Defendant, Elizabeth Kuellmar, testified that she and her husband lived in the building on-and-off during the past 10 years and that they have maintained another residence in Antioch since 1967. She stated that she was living in the building during the time of the instant litigation and that it was in excellent condition. She also testified that certain repairs had been made to the premises and that there was no hot running water and no heat.

During the trial, plaintiff's counsel moved for the trial court to conduct a visual examination of the premises. Defense counsel concurred in this motion and the trial court viewed the premises. At the close of trial, the trial court entered a judgment for demolition which stated that plaintiff "has fully sustained the material allegations of the complaint and that the building located on the above premises is dangerous and in an unsafe condition." Defendants appeal from this judgment.

The first issue is whether the trial court committed reversible error in the conduct of the physical inspection of the premises. In *Belmont Nursing Home* v. *Department of Public Aid* (1982), 108 Ill. App. 3d 660, 439 N.E.2d 511,

we noted the general rules regarding such inspection. There, we stated that:

> "[g]enerally, it is established that facts gained from a judge's personal observations during an inspection cannot be considered in evidence. The only legitimate purpose of an inspection is to enable the court to understand the issues and apply the evidence which is properly admitted. (*Devon Bank* v. *Department of Transportation* (1981), 95 Ill. App. 3d 690, 420 N.E.2d 605; see also *Drovers National Bank* v. *Great Southwest Fire Insurance Co.* (1977), 55 Ill. App. 3d 953, 371 N.E.2d 855.) These rules are to be strictly applied in a bench trial. (*Lancer Industries, Inc.* v. *City of Aurora* (1975), 30 Ill. App. 3d 962, 333 N.E.2d 653.) Although in a bench trial it is presumed that the trial judge has considered only competent evidence, this presumption may be rebutted where the record affirmatively shows the contrary. *Drovers National Bank;* see *People* v. *Gilbert* (1977), 68 Ill. 2d 252, 369 N.E.2d 849." (108 Ill. App. 3d 660, 664, 439 N.E.2d 511, 514.)

Defendants insist that the record plainly rebuts any presumption that the trial judge considered only admissible evidence. They refer to the trial court's following statement made at the close of trial: "Let the record show that as far as I am concerned, after viewing the premises as to its condition today, I believe the building and the premises are unsafe and dangerous as far as I'm concerned." We do not find the presumption of competency of the evidence sufficiently rebutted by these comments for the following reasons.

First, the record indicates that plaintiff and defendants concurred that a judicial inspection might assist the court in understanding the evidence in the case, and, indeed it appears from the record that such an inspection may well have assisted the court in understanding certain photographic evidence portraying the premises. Moreover, fo-

cusing on the entire record, it is apparent that the trial court based its findings not on its inspection, but upon the rather substantial competent evidence presented by the parties in open court. We feel that this evidence provided ample independent basis for the trial court's findings. Thus, the instant case is clearly distinguishable from *Belmont Nursing Home* where under different circumstances we held that a stay order could only have been characterized as the clear product of the court's investigation into the facts. It is noted that the instant order recites that it was entered by the court, "having heard the testimony of the witness and personally viewing the premises, *and after consideration of the testimony of the witnesses and the exhibits introduced in evidence* * * *." (Emphasis added.) We find nothing in the above-quoted language to rebut the presumption of competency of the evidence, but rather we consider this passage to only underscore our conclusion that the trial court did not impermissibly rely on its observations in entering the instant judgment. Accordingly, we do not find that the presumption of competency of the evidence was rebutted on this record.

Defendants next contend that the trial court committed reversible error by not specifically detailing in its judgment of demolition the particular defects rendering the building unsafe and dangerous. The judgment merely stated that "the Plaintiff * * * has fully sustained the material allegations of the Complaint, and that the building * * * is dangerous and in an unsafe condition."

While it has been held that there is a strict policy in Illinois not to order the demolition of buildings unless the structure is substantially beyond repair, and courts granting demolition judgments are required to specify the defects which render the building dangerous and unsafe

(see *City of Chicago Heights* v. *Furrer* (1981), 99 Ill. App. 3d 414, 425 N.E.2d 1125; *Schwartz* v. *City of Chicago* (1974), 21 Ill. App. 3d 84, 315 N.E.2d 215), we do not find that under the circumstances here, the court's failure to specify the defects resulted in reversible error.

First, the defendants participated in the instant hearing and were vigorously represented by counsel. However, no request for such specific findings was ever made by defendants, nor did they ever object to the entry of judgment in its present form, factors which we believe strongly attenuate any claimed error. Second, the instant complaint contained specific allegations of dangerous and unsafe conditions existing in the building, and the expert opinion testimony presented at the hearing established numerous specific conditions which would render the building dangerous and unsafe. Thus, from the record it is clear that the trial court was presented with sufficient specific defects to conclude that the building was unsafe and dangerous. Finally, the above factors render the instant case clearly distinguishable from the situations requiring reversal in *Schwartz* and *City of Chicago Heights*. *Schwartz* involved a plaintiff's claim charging negligent failure of the defendant City to notify them of a demolition suit, and therefore it has little, if any, precedential application to the present case. In *City of Chicago Heights*, the trial court ordered demolition in an *ex parte* hearing brought on a complaint which only specified certain categories of code violations, without further allegations of the unsafe or dangerous conditions of the building in question. Also, no record of the *ex parte* hearing was preserved for review, and there was found to exist a controversy over the issue of the repairability of the building. The reviewing court reversed, concluding that a trial on the merits would better serve the parties. In the instant case, however, the

matter was fully tried on the merits, and judging from the completeness of the record, we conclude that no useful purpose would be served by requiring such specific finding upon remand. Indeed, under Supreme Court Rule 366 (b)(3)(i) (73 Ill. 2d R. 366(b)(3)(i)), in non-jury cases, no such special findings of fact are generally necessary to support a judgment, or as a basis for review. Based on all the foregoing, we find no reversible error arising from the trial court's failure to specify the defects in the instant judgment.

Finally, defendants contend that plaintiff has failed to sustain the burden of proof required for a judgment of demolition. In oral argument before this court, however, counsel for appellant has conceded that absent the trial court's inspection, there was sufficient evidence on the record to sustain the instant judgment. This concession by counsel notwithstanding, we find that on this record there is abundant and detailed proof to support the judgment of demolition.

For the foregoing reasons, the judgment of the circuit court is hereby affirmed.

Affirmed.

MEJDA, LORENZ and WILSON, JJ., concur.

APPENDIX B

ILLINOIS SUPREME COURT

Juleann Hornyak, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

April 12, 1983

Mr. Lonny Ben Ogus
Attorney at Law
39 S. LaSalle St., S#920
Chicago, IL 60603

No. 57916—Village of Brookfield, etc., respondent, vs. Bethhold R. Kuellmar, et al., petitioners. Leave to appeal, Appellate Court, First District.

The Supreme Court today *DENIED* the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Juleann Hornyak

Clerk of the Supreme Court

APPENDIX C

(After a discussion was had in chambers, outside the presence and hearing of the Court Reporter, the following proceedings were had:)

The Court: Back on the record.

As far as the discussion as to whether the Court will view the premises, I believe someone has some comments to make here.

Mr. Billik: I would like to renew my motion to assist the Court, that the Court view the premises to have a first-hand view of the testimony being brought out here and I would like to do it this afternoon if possible.

Mr. Bacci: For the record, as the attorney for the defendants, if it would assist the Court in its decision in this particular litigation, so be it.

The Court: Fine, let's agree to a time where we will all be there to view the premises. We are ten minutes away from it, is that correct?

Mr. Billik: On the outside, fifteen.

The Court: Off the record.

(After a discussion was had outside the record, the following proceedings were had:)

The Court: It's ten minutes of 1:00. We will be there at ten after 2:00. That should give us enough time to observe this, is that correct?

Mr. Bacci: Fine, Judge.

The Court: And we will start the hearing at 2:30.

(A luncheon recess was had.)

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK
COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT — FOURTH DISTRICT

VILLAGE OF BROOKFIELD, A MUNICIPAL CORPORATION, Plaintiff,	)	
VS	)	NO: 81-M4-1859
BERTHOLD R. KUELLMAR and ELIZABETH S. KUELLMAR, his wife and Unknown Owners, Defendants.	)	

REPORT OF PROCEEDINGS of the trial held in the above-entitled matter on the 30th day of March, A.D. 1981, commencing at the hour of 3:00 o'clock p.m., Court Room H, Maybrook Center, Maywood, Illinois, before the Honorable ANGELO D. MISTRETTA, Associate Judge of said court.

APPEARANCES:

MR. RICHARD J. BILLIK,
appeared on behalf of the Plaintiff;

MESSRS. WEINSTEIN & BACCI, LTD., by:

MR. GUY J. BACCI,
appeared for the Defendants.

The Court: Do you have any other witnesses?
Mr. Billik: Yes, I do, your Honor.

The Court: Mr. Billik, would you step up, please. Off the record.

(After a discussion was held outside the record, the following proceedings were had:)

(Enter witness.)

The Court: Swear the witness please.

(Witness sworn.)

EDWARD GORNIAK, called as a witness on behalf of the Village of Brookfield—Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Billik.

Q. Would you state your name and occupation?

A. Edward Gorniak, Fire Chief, Village of Brookfield.

Q. What are your duties as fire chief of the Village of Brookfield?

A. To head the training and supervising the affairs of the fire department and to oversee the code enforcement.

Q. How long have you had this position as fire chief?

A. Approximately seventeen years.

APPENDIX D

Q. You're not in the trades either?

A. No, I am not.

Mr. Billik: I have no further questions.

The Court: Ma'am, you may step down. Thank you very much.

The Witness: Thank you.

(Witness excused.)

The Court: No more questions?

Mr. Bacci: No more questions.

The Court: How about you, Mr. Billik?

Mr. Billik: No, your Honor.

Mr. Bacci: The Defense rests.

The Court: All right, gentlemen, approach the Bench. Do you want to make any kind of closing statement?

Mr. Billik: I will waive closing, your Honor.

Mr. Bacci: Waived.

The Court: Let the record show that as far as I'm concerned, after viewing the premises as to its condition today, I believe that the building and the premises are unsafe and dangerous as far as I'm concerned.

In addition to my order of January, in January, 1982, there was supposed to be electrical work done and I find as of today that has not been done and no permit having been issued, it's the order of this Court that the building

APPENDIX E

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK
COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, FOURTH DISTRICT

VILLAGE OF BROOKFIELD, a Municipal Corporation, Plaintiff,	)	
V.	)	NO. 81 M4-1859
	)	In Chancery
BERTHOLD R. KUELLMAR and ELIZABETH S. KUELLMAR, et al., Defendants.	)	

DECREE OF DEMOLITION

THIS CAUSE COMING ON to be heard on the verified complaint of the Plaintiff, VILLAGE OF BROOKFIELD, a Municipal Corporation, by RICHARD J. BILLIK, its attorney, Defendants, BERTHOLD R. KUELLMAR and ELIZABETH S. KUELLMAR, by GUY J. BACCI, of the Law Firm of WEINSTEIN & BACCI, LTD., and the Court having heard the testimony of the witnesses and personally viewing the premises, and after consideration of the testimony of the witnesses and the exhibits introduced in evidence, and the Court being fully advised in the premises FINDS:

That it has jurisdiction of the parties and the subject matter which is the premises located at 3620 Prairie Avenue, Brookfield, Illinois, and legally described as:

> Lots 11 and 12 in Block 14 in Grossdale, a Subdivision of the Southeast Quarter of Section 34, Township 39 North, Range 12, East of the Third Principal Meridian, in Cook County, Illinois

That the Plaintiff, VILLAGE OF BROOKFIELD, a Municipal Corporation, has fully sustained the material

allegations of the complaint, and that the building located on the above premises is dangerous and in an unsafe condition.

WHEREFORE, IT IS HEREBY ORDERED THAT the Plaintiff, VILLAGE OF BROOKFIELD, a Municipal Corporation, be and is hereby authorized and directed to demolish the building on the aforesaid premises.

IT IS FURTHER ORDERED THAT the necessary costs and expenses of abating the nuisance by the said demolition of the building or structure be charged against the Defendant owners of the said premises, and that this matter be continued for the purpose of the VILLAGE OF BROOKFIELD, a Municipal Corporation, to ascertain the demolition costs to be incurred in abating the nuisance and for the further purpose of advising this Court of what attempts have been made to utilize Human or Family Services Departments to assist in the relocation of the owners.

IT IS FURTHER ORDERED THAT this Court reserve jurisdiction of this cause to carry out the terms of this Decree.

IT IS FURTHER ORDERED THAT this cause be continued to April 19, 1982 to determine the cost of the demolition of said building and the status of the owners occupancy of said premises.

ENTER:

/s/ A. D. Mistretta
JUDGE

RICHARD J. BILLIK
Attorney for Plaintiff
11 S. LaSalle St.
Chicago, Illinois 60603
(312) 332-7875

Office-Supreme Court, U.S.
FILED
AUG 6 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-2010

In the Supreme Court of the United States

October Term, 1982

BERTHOLD R. KUELLMAR and
ELIZABETH S. KUELLMAR,

Petitioners,

vs.

VILLAGE OF BROOKFIELD,
A MUNICIPAL CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RICHARD J. BILLIK
BILLIK AND BILLIK, LTD.
Suite 700
11 South LaSalle Street
Chicago, Illinois 60603
(312) 332-7875
Attorney for Respondent

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTION PRESENTED

1. Whether this Honorable Court should entertain Petitioners' Writ of Certiorari based on a purported claim of a denial of due process when an order for demolition is entered by the Trial Court after considering substantial and detailed proof to support demolition and after viewing the premises by agreement of both parties to assist the Court in understanding the evidence admitted at trial?

TABLE OF CONTENTS

PAGE

Question Presented i

Statement of the Case 1

Reasons for Not Granting Petitioners' Writ of Certiorari 3

Argument 4

Conclusion 6

Appendices:

Appendix A—Order of Trial Court, "Decree of Demolition", (R. 59) ..... App. 1

Appendix B—Transcript of Trial pp. 55 and 56 App. 3

TABLE OF AUTHORITIES CITED

Cases

Devon Bank v. Department of Transportation, 95 Ill. App.3d 690, 420 N.E.2d 605 (1981) 5

People v. Gilbert, 68 Ill.2d 252, 369 N.E.2d 849 (1977) 5, 6

Rushing v. Camp, 19 Ill. App.3d 435, 311 N.E.2d 757 (1974) 5

Statutes and Ordinances

Illinois Revised Statutes, Chapter 24, Section 11-31-1 .. 2

Code of Ordinances of the Village of Brookfield, Chapter 6, Article IV, Section 6-62 *et seq.* 2

In the
Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-2010

BERTHOLD R. KUELLMAR and
ELIZABETH S. KUELLMAR,

Petitioners,

vs.

VILLAGE OF BROOKFIELD,
A MUNICIPAL CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners, Berthold R. Kuellmar and Elizabeth S. Kuellmar, hereinafter referred to as "Petitioners", are seeking to appeal an order which denied their Petition for leave to appeal this action to the Illinois Supreme Court and which permits the Respondent, Village of Brookfield, hereinafter referred to as "Village", to arrange for the demolishment of the building on the premises owned by Petitioners because it was proven at trial to be dangerous and unsafe to the public.

The Village instituted this demolition action pursuant to Chapter 24, Illinois Revised Statutes, Section 11-31-1 and Chapter 6, Code of Ordinances of the Village of Brookfield, Article IV, Section 6-62 *et seq.*

The evidence presented at trial included the testimony of a number of witnesses and the submission of trial exhibits, including photographs of the premises. Based upon this evidence presented at trial, the Trial Court found the building to be unsafe and dangerous to the public and upheld the Village's right to demolish it.

During the non-jury trial, the Trial Court, pursuant to the suggestion of Respondent's counsel and concurrence of Petitioners' trial counsel, visited the premises in question in order to assist the Court in understanding the evidence in the case. (Trial T. pgs. 48-49, 55-56).

Under the terms of the Trial Court's Decree of Demolition entered in this action, the Court, after reciting that it heard the testimony and viewed the premises, explicitly stated that the Village "has fully sustained the material allegations of the Complaint and that the building located on the above premises is dangerous and in an unsafe condition", and the Trial Court further noted that its findings in the action are not based upon the viewing but on "consideration of testimony of witnesses and the exhibits introduced at trial". (Record on Appeal pgs. 59-60).

The Appellate Court of Illinois affirmed the Trial Court's ruling and held that based upon the record, there is abundant and detailed proof to support the Judgment of demolition. (Slip Op. p. 12). On April 12, 1983, the Supreme Court of Illinois denied Petitioners' request for leave to appeal the action. Petitioners have now filed their pending Petition for a Writ of Certiorari in the Supreme Court of the United States.

REASONS FOR NOT GRANTING PETITIONERS' WRIT OF CERTIORARI

This Court should deny Petitioners' request for Writ of Certiorari because the Trial Court, Appellate Court of Illinois and Supreme Court of Illinois gave full consideration to the issues and decided the same correctly. The Judgment of demolition entered in this action is clearly supported by the evidence presented at trial in this action and the Trial Court and the reviewing Courts relied solely upon this evidence to declare the building at issue to be unsafe and dangerous to the public.

Moreover, Petitioners have failed to set forth in their Petition sufficient facts to claim a constitutional issue which would warrant this Court's attention. Petitioners were vigorously represented by counsel who had concurred in the visual inspection of the premises by the Trial Court, upon which Petitioners now purportedly base their Petition for Writ of Certiorari. The record firmly establishes that Petitioners were not deprived of due process under the law and that the evidence overwhelmingly supports the Trial Court's Judgment of demolition.

ARGUMENT

Petitioners have failed to set forth sufficient facts or other indicia in their Petition for a Writ of Certiorari to raise a purported constitutional issue for this Honorable Court to review and consider.

Based solely on the Trial Court's visual inspection, Petitioners contend generally that they were allegedly denied due process of law under the Fourteenth Amendment of the United States Constitution. Petitioners have failed, however, to state specifically how their constitutional rights were allegedly harmed or prejudiced by the Trial Court's inspection of the site, especially in view of the overwhelming evidence introduced at trial in favor of demolition and their trial counsel's concurrence in the inspection.

Petitioners have simply ignored the court record in an attempt to construct a feeble due process claim. Initially, Petitioners fail to address the fact that their trial counsel concurred in and approved the visual inspection of the premises by the Trial Court. Moreover, the trial record is replete with evidence supporting the ruling that the building is dangerous and unsafe to the public and should be demolished. The Trial Court heard substantial testimony at trial from a number of expert witnesses, including, the Village's Building Inspector, the Village's Fire Chief, a Real Estate Appraiser, a State Registered Sanitarian, a Registered Architect and a Structural Engineer, and viewed photographs of the premises. The evidence proved the specific allegations of dangerous and unsafe conditions existing in the building which are contained in the instant complaint filed by the Village. Addi-

tional evidence established that the building, itself, has no value and the cost of making the building habitable would be well in excess of sixty thousand dollars. (Trial T. pgs. 52-54, 79).

In fact, the Illinois Appellate Court even noted that Petitioners' counsel had conceded at oral argument that the evidence was overwhelmingly in favor of demolition and stated:

> Finally, Defendants contend that Plaintiff has failed to sustain the burden of proof required by a judgment of demolition. *In oral argument before this court, however, counsel for appellant (Petitioners) has conceded that absent the trial court's inspection, there was sufficient evidence in the record to sustain the instant judgment.* This concession by counsel notwithstanding, we find that on this record there is abundant and detailed proof to support the judgment of demolition. (Slip Op. p. 12, Emphasis Supplied).

The Appellate Court also found that the record clearly establishes that the Trial Judge only considered admissible evidence in reaching his decision and that the inspection may well have assisted the Judge in better understanding the evidence admitted at trial, particularly the photographic evidence portraying the premises. (Slip Op. p. 9).

It has generally been held that the Court may exercise its discretion to view evidence firsthand in order to understand the issues and apply the evidence which is admitted. *Devon Bank* v. *Department of Transportation*, 95 Ill. App. 3d 690, 420 N.E.2d 605 (1981). *People* v. *Gilbert*, 68 Ill.2d 252, 369 N.E.2d 849 (1977); *Rushing* v. *Camp*, 19 Ill. App. 3d 435; 311 N.E.2d 757 (1974). The presumption that the Trial Court considered only competent evidence in reaching his decision cannot be challenged where there is an

abundance of competent evidence apparent in the record upon which the Trial Judge based his decision. *People* v. *Gilbert, supra.*

The legal authority cited by Petitioners is inapplicable and easily distinguishable from the instant action. The cases do not support Petitioners' purported claim because the instant record clearly establishes that the inspection of the premises occurred with the parties' knowledge and approval, that the Judgment entered herein was based solely on evidence presented at trial, and that Petitioners had ample opportunity to defend themselves at trial by confronting adverse evidence and presenting their own arguments.

CONCLUSION

It is respectfully submitted that based upon the foregoing, Petitioners' purported claim of a denial of due process is clearly without merit and their Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

.....

Richard J. Billik
Billik & Billik, Ltd.
11 S. La Salle, Suite 700
Chicago, Illinois 60603
(312) 332-7875
Attorney for Respondent

APPENDIX

APPENDIX A

STATE OF ILLINOIS	)	
	) SS	
COUNTY OF COOK	)	

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, FOURTH DISTRICT

VILLAGE OF BROOKFIELD, a Municipal Corporation, Plaintiff,	)	
V.	)	NO. 81 M4-1859
	)	In Chancery
BERTHOLD R. KUELLMAR and ELIZABETH S. KUELLMAR, et al., Defendants.	)	

DECREE OF DEMOLITION

THIS CAUSE COMING ON to be heard on the verified complaint of the Plaintiff, VILLAGE OF BROOKFIELD, a Municipal Corporation, by RICHARD J. BILLIK, its attorney, Defendants, BERTHOLD R. KUELLMAR and ELIZABETH S. KUELLMAR, by GUY J. BACCI, of the Law Firm of WEINSTEIN & BACCI, LTD., and the Court having heard the testimony of the witnesses and personally viewing the premises, and after consideration of the testimony of the witnesses and the exhibits introduced in evidence, and the Court being fully advised in the premises FINDS:

That it has jurisdiction of the parties and the subject matter which is the premises located at 3620 Prairie Avenue, Brookfield, Illinois, and legally described as:

> Lots 11 and 12 in Block 14 in Grossdale, a Subdivision of the Southeast Quarter of Section 34, Township 39 North, Range 12, East of the Third Principal Meridian, in Cook County, Illinois

That the Plaintiff, VILLAGE OF BROOKFIELD, a Municipal Corporation, has fully sustained the material allegations of the complaint, and that the building located on the above premises is dangerous and in an unsafe condition.

WHEREFORE, IT IS HEREBY ORDERED THAT the Plaintiff, VILLAGE OF BROOKFIELD, a Municipal Corporation, be and is hereby authorized and directed to demolish the building on the aforesaid premises.

IT IS FURTHER ORDERED THAT the necessary costs and expenses of abating the nuisance by the said demolition of the building or structure be charged against the Defendant owners of the said premises, and that this matter be continued for the purpose of the VILLAGE OF BROOKFIELD, a Municipal Corporation, to ascertain the demolition costs to be incurred in abating the nuisance and for the further purpose of advising this Court of what attempts have been made to utilize Human or Family Services Departments to assist in the relocation of the owners.

IT IS FURTHER ORDERED THAT this Court reserve jurisdiction of this cause to carry out the terms of this Decree.

IT IS FURTHER ORDERED THAT this cause be continued to April 19, 1982 to determine the cost of the demolition of said building and the status of the owners occupancy of said premises.

ENTER: */s/ A. D. Mistretta*
JUDGE

RICHARD J. BILLIK
Attorney for Plaintiff
11 S. LaSalle St.
Chicago, Illinois 60603
(312) 332-7875

APPENDIX B

(After a discussion was had in chambers, outside the presence and hearing of the Court Reporter, the following proceedings were had:)

The Court: Back on the record.

As far as the discussion as to whether the Court will view the premises, I believe someone has some comments to make here.

Mr. Billik: I would like to renew my motion to assist the Court, that the Court view the premises to have a first-hand view of the testimony being brought out here and I would like to do it this afternoon if possible.

Mr. Bacci: For the record, as the attorney for the defendants, if it would assist the Court in its decision in this particular litigation, so be it.

The Court: Fine, let's agree to a time where we will all be there to view the premises. We are ten minutes away from it, is that correct?

Mr. Billik: On the outside, fifteen.

The Court: Off the record.

(After a discussion was had outside the record, the following proceedings were had:)

The Court: It's ten minutes of 1:00. We will be there at ten after 2:00. That should give us enough time to observe this, is that correct?

Mr. Bacci: Fine, Judge.

The Court: And we will start the hearing at 2:30.

(A luncheon recess was had.)

FILED
AUG 18 1983
ALEXANDER L. STEVAS
CLERK

No. 82-2010

In the Supreme Court of the United States

OCTOBER TERM, 1982

BERTHOLD R. KUELLMAR and
ELIZABETH S. KUELLMAR,

Petitioners,

vs.

VILLAGE OF BROOKFIELD,
A MUNICIPAL CORPORATION,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

LONNY BEN OGUS
Suite 920
39 South LaSalle Street
Chicago, Illinois 60603
(312) 332-7374
Attorney for Petitioners

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

TABLE OF CONTENTS

	PAGE
Table of Authorities	i
Argument	1
Conclusion	4

TABLE OF AUTHORITIES

Armstrong v. Manzo, 380 U.S. 545 (1965)	3
Bute v. Illinois, 333 U.S. 640 (1974)	2
Carey v. Piphus, 435 U.S. 247 (1978)	2
Coe v. Armour Fertility Works, 237 U.S. 413 (1915)	3
Fuentes v. Shevin, 407 U.S. 67 (1972)	3
Goldberg v. Kelly, 397 U.S. 254 (1970)	3
Irvin v. Dowd, 366 U.S. 717 (1961)	3
Murphy v. Florida, 421 U.S. 794 (1975)	3
Southern Railway Company v. Virginia, 290 U.S. 190 (1934)	2

In the
Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-2010

BERTHOLD R. KUELLMAR and ELIZABETH S. KUELLMAR,

Petitioners,

VS.

VILLAGE OF BROOKFIELD, A MUNICIPAL CORPORATION,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

ARGUMENT

In their entire "Brief In Opposition To Petition For A Writ Of Certiorari", Respondent does not cite a single decision of any Federal Court. In their entire "Brief In Opposition To Petition For A Writ Of Certiorari", Respondent does not cite a single case decided under the

Fourteenth Amendment to the United States Constitution. In their entire Brief, Respondent does not attempt to distinguish, or even mention, any of the cases relied on by Petitioners.

The Petition sought a review of this case to an end determination that Petitioners' Constitutional rights to due process, as per the Fourteenth Amendment, were violated when the trial Court, upon Motion of Respondents, did a private investigation which is not on the record and thus cannot be rebutted or cross-examined. The three Illinois cases cited by Respondent have nothing to do with the Fourteenth Amendment. The two Illinois statutes cited have nothing to do with the Fourteenth Amendment.

Due process under the Fourteenth Amendment requires that state action be consistent with fundamental principles of liberty and justice, *Southern Railway Company* v. *Virginia*, 290 U.S. 190, 196 (1934). It is the province of this Court to decide whether practice of the State Court, even if in accordance with the laws of the State, was at variance with procedure constituting due process of law under the Fourteenth Amendment, *Bute* v. *Illinois*, 333 U.S. 640, 670 (1974). Thus, the Illinois decisions are irrelevant to this Court's determination. Due process minimizes unfair deprivation of property by enabling persons to contest the basis upon which a State proposes to deprive persons of protected interests, *Carey* v. *Piphus*, 435 U.S. 247, 259 (1978).

Respondents argue that "the trial record is replete with evidence supporting the ruling." (at 4) They cite no case which would distinguish or overrule this Court's holding that "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would

have led to the same result because he had no adequate defense upon the merits", *Coe* v. *Armour Fertility Works,* 237 U.S. 413, 424 (1915), *Fuentes* v. *Shevin,* 407 U.S. 67, 87 (1972), See also *Irvin* v. *Dowd,* 366 U.S. 717, 722 (1961).

Respondents somehow assert that Petitioners have failed to specifically state how their Constitutional rights were deprived (at 4). The entire thrust of the Petition For A Writ Of Certiorari is that Petitioners were denied their right to due process of law in that their rights to have the decisions based solely on evidence produced in Court, see *Irvin* v. *Dowd,* supra, and *Murphy* v. *Florida,* 421 U.S. 794 (1975), was denied and thus they were not allowed to confront or rebut the evidence against them, see *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), *Armstrong* v. *Manzo,* 380 U.S. 545 (1965).

In reaching its decision, the trial Court specifically stated:

> "[L]et the record show that as far as I'm concerned, *after viewing the premises, as to its condition today,* I believe the building and the premises are unsafe and dangerous as far as I'm concerned." (emphasis added)

The trial Court's written "Decree of Demolition" states that the decision was made "after personally viewing the premises". Thus, the view, made *dehors* the record, was used in reaching a decision. The view was made upon Motion of the Respondent.

Respondent's total lack of authority under the Constitution of the United States shows their position and the decision of the State Court to be untenable. Their assertion that the cases above are "inapplicable and easily distinguishable" (at 6) is without merit since they fail to even try to distinguish them.

CONCLUSION

As originally set out in the Petition for a Writ of Certiorari, this Court should grant the Petition to the ultimate end that the decision of the State Court be reversed. Petitioners' rights to due process, as guaranteed by the 14th and 5th Amendments, were denied in the attempt to take their property.

Respectfully submitted,

LONNY BEN OGUS
Suite 920
39 South LaSalle Street
Chicago, Illinois 60603
(312) 332-7374

Attorney for Petitioners.